

Before the  
Federal Communications Commission  
Washington, DC 20554

0700

FCC 17M-31

In the Matter of	)	MB Docket No. 14-82
	)	
PATRICK SULLIVAN	)	FRN 0003749041, 0006119796,
(Assignor)	)	0006149843, 0017196064
	)	
And	)	Facility ID No. 146162
	)	
LAKE BROADCASTING, INC.	)	File No. BALFT-20120523ABY
(Assignee)	)	
	)	
Application for Consent to Assignment of	)	
License of FM Translator Station W238CE,	)	
Montgomery, Alabama	)	

**MEMORANDUM OPINION AND ORDER**

Issued: August 28, 2017

Released: August 28, 2017

**FACTUAL BACKGROUND**

On May 23, 2014, the Media Bureau issued a Hearing Designation Order (*HDO*) to determine whether the application of Lake Broadcasting, Inc. (Lake) to purchase an FM Translator Station in Montgomery, Alabama from Patrick Sullivan (Sullivan) should be granted. The *HDO* set specific issues to determine, in light of the criminal convictions and misrepresentations of Lake's president and owner, Michael Rice, whether Rice and Lake possess the basic character qualifications to hold the Station authorization.<sup>1</sup> The issues set for hearing include:<sup>2</sup>

- a. The effects, if any, of Michael S. Rice's felony convictions on his qualifications and or the qualifications of Lake Broadcasting, Inc., to be a Commission licensee;
- b. The effects, if any, of the misrepresentation and lack of candor by Michael S. Rice's broadcast companies on his qualifications and/or the qualifications of Lake Broadcasting, Inc., to be a Commission licensee;
- c. In light of the evidence adduced pursuant to the foregoing issues, whether Michael S. Rice and/or Lake Broadcasting, Inc., is qualified to be a Commission licensee; and

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<sup>1</sup> *HDO* at 1.

<sup>2</sup> *Id.* at 9-10.

- d. In light of the evidence adduced pursuant to the foregoing issues, whether the captioned Application for consent to the assignment of license for Station W238CE should be granted.

A hearing was held from May 3 to May 5, 2017. On the third and final day of the hearing, Lake unexpectedly announced that it had decided to withdraw the application at issue.<sup>3</sup> On May 8, 2017, Lake filed a Motion to Dismiss. On May 9, 2017, Lake filed a Motion to Disqualify the Presiding Judge. On May 11, 2017, Sullivan submitted his own Motion to Dismiss, declaring his intention to sell the station to a third party rather than to Lake. On June 8, 2017, the Presiding Judge denied both Motions to Dismiss.<sup>4</sup>

### JUDICIAL DISQUALIFICATION

Procedures for disqualification of a presiding administrative law judge during the course of an adjudication are prescribed in Section 1.245 of the Commission's Rules, which provides that:

(b) Any party may request the presiding [judge] to withdraw on the grounds of personal bias or other disqualification.

(1) The person seeking disqualification shall file with the presiding [judge] an affidavit setting forth in detail the facts alleged to constitute grounds for disqualification. Such affidavit shall be filed not later than 5 days before the commencement of the hearing unless, for good cause shown, additional time is necessary.

(2) The presiding [judge] may file a response to the affidavit; and if he believes himself not disqualified, shall so rule and proceed with the hearing.

(3) The person seeking disqualification may appeal a ruling of disqualification, and, in that event, shall do so at the time the ruling is made. Unless an appeal of the ruling is filed at this time, the right to request withdrawal of the presiding [judge] shall be deemed waived.

(4) If an appeal of the ruling is filed, the presiding [judge] shall certify the question, together with the affidavit and any response filed in connection therewith, to the Commission. The hearing shall be suspended pending a ruling on the question by the Commission.

(5) The Commission may rule on the question without hearing, or it may require testimony or argument on the issues raised.

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<sup>3</sup> Tr. 653:4-11 (May 5, 2017).

<sup>4</sup> See Order, FCC 17M-25 (rel. June 8, 2017).

(6) The affidavit, response, testimony or argument thereon, and the Commission's decision shall be part of the record in the case.

In order to disqualify the Presiding Judge from an adjudicatory proceeding, the party seeking disqualification must demonstrate "a personal bias or prejudice that will impair the ALJ's ability to act in an impartial manner."<sup>5</sup> Courts have held that opinions do not constitute a basis for a bias or partiality motion "unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible."<sup>6</sup> For instance, the judge's statements in *Berger v. United States* displayed a personal bias and prejudice against German-Americans in a World War I espionage case, which the Supreme Court determined would likely prevent or impede impartiality of judgment.<sup>7</sup> The *Berger* petitioners alleged that during the proceedings, the judge stated in substance:

One must have a very judicial mind, indeed, not to be prejudiced against the German-Americans in this country. You are of the same mind that practically all the German-Americans are in this country . . . Your hearts are reeking with disloyalty. I know a safe-blower, he is a friend of mine, who is making a good soldier in France. He was a bank robber for nine years, that was his business in peace time, and now he is a good soldier, and as between him and this defendant, I prefer the safe-blower.<sup>8</sup>

Generally, the alleged bias or prejudice "must stem from an extrajudicial source and result in an opinion on the merits on some basis *other than what the judge has learned from his participation in the case.*"<sup>9</sup> Despite the Supreme Court's language in *Grinnell Corp.*, however, the Commission has opined that, given the difficulty of establishing an extrajudicial source of bias, "comments and rulings of the trier of fact may be relevant to the existence of prejudice."<sup>10</sup> There was nothing said in court by the Judge that could be considered biased or prejudicial.

Moreover, while a heavy burden of proof is placed on a party seeking disqualification generally, motions to disqualify solely on the basis of the judge's conduct during the proceeding are granted "only in the rarest circumstances."<sup>11</sup> The reasons and facts stated in an affidavit charging a judge with bias or prejudice for the belief in such bias or prejudice "must give fair support to the charge of a bent of mind that may prevent or impede impartiality of judgment."<sup>12</sup> In *Berger*, the petitioners' motion was granted because "the facts and reasons [the affidavit] states [i.e., the judge's comments regarding German-American hearts 'reeking with disloyalty']

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<sup>5</sup> *WWOR-TV, Inc.*, 4 FCC Rcd 6155, 6155 (1989) (citing *Barnes Enterprises, Inc.*, 66 FCC 2d 499, 501 (1977)).

<sup>6</sup> *Family Broadcasting, Inc.*, 17 FCC Rcd 19332, 19333 (2002) (quoting *Liteky v. United States*, 510 U.S. 540, 555 (1994) (internal quotations omitted)).

<sup>7</sup> *Berger v. United States*, 255 U.S. 22 (1921).

<sup>8</sup> *Id.* at 28-29 (internal quotations omitted).

<sup>9</sup> *United States v. Grinnell Corp.*, 384 U.S. 563, 583 (1966) (emphasis added).

<sup>10</sup> *KAYE Broadcasting, Inc.*, 35 FCC 2d 548, 548 (1972).

<sup>11</sup> *Liteky*, 510 U.S. at 555.

<sup>12</sup> *Berger*, 255 U.S. at 33-34.

are not frivolous or fanciful, but substantial and formidable . . . .”<sup>13</sup> As discussed below, Lake has not proven through facts or reasoning that anything near the same level of prejudice exists here, and that the Presiding Judge’s alleged bias displays the same level of deep-seated favoritism or antagonism that would make a fair judgment impossible.

## DISQUALIFICATION MOTION

On May 9, 2017, Lake filed a Motion to Disqualify the Presiding Judge (Motion to Disqualify). Citing Section 1.245(b) of the Commission’s Rules, Lake alleges that the Presiding Judge has “demonstrated bias and prejudice against Lake and Lake’s President, sole owner, and director, Michael S. Rice.”<sup>14</sup> Lake argues that the following “missteps” represent the Presiding Judge’s prejudice and bias against Lake and Michael Rice:<sup>15</sup>

### A. Evidence Regarding Rice’s Previous Criminal Convictions

Lake disputes the Judge’s ruling to admit into evidence records from the Missouri Department of Corrections concerning Mr. Rice, because the DOC records were “only” admitted as business records.<sup>16</sup> Lake also disputes the Judge’s decision to allow Dr. Weitzl and Tammy Gremminger to rely on these documents at the hearing and in their direct case exhibits for the same reason.<sup>17</sup>

First, under Federal Rule of Evidence 803(6), “business records” are admitted for the truth of the matters asserted therein.<sup>18</sup> While Lake disputes the Judge’s decision to allow Dr. Weitzl and Tammy Gremminger to quote these documents at the hearing because they were admitted into evidence “only” as “business records,”<sup>19</sup> the Federal Rules of Evidence clearly explain that business and public records are *exceptions* to the hearsay rule, and as such, are admitted precisely for the truth of the matters asserted therein.<sup>20</sup> This is one example of Lake’s lack of due diligence in failing to examine the pertinent black letter law before crying foul.

Second, Rice’s criminal history was reviewed only to put the issues from the *HDO* in its proper historical context. It was necessary to review Rice’s criminal history in order to evaluate and assess his rehabilitation therefrom, since, pursuant to the *HDO*, that issue directly bears on his and Lake’s qualifications to be a Commission licensee. As the Judge made clear during the hearing, “[N]othing is being re-litigat[ed] here. . . . [The Bureau is] not putting evidence on of

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<sup>13</sup> *Id.*

<sup>14</sup> Motion to Disqualify at 1.

<sup>15</sup> *Id.* at 2-3.

<sup>16</sup> See Declaration of Jerold L. Jacobs, Esq. Concerning the Motion to Disqualify Chief ALJ Richard L. Sippel (Jacobs Declaration) at 2.

<sup>17</sup> *Id.*

<sup>18</sup> See Federal Rules of Evidence 803(6) (records kept in the course of a regularly conducted business activity are exceptions to the rule against hearsay).

<sup>19</sup> Jacobs Declaration at 2; Tr. 256:23-257:16 (May 3, 2017).

<sup>20</sup> See Federal Rules of Evidence 803(6) & (8).

each of these counts, criminal counts [to] which [Rice] had pled guilty. That's not happening. And I don't want to waste time going through that kind of an objection."<sup>21</sup>

Lake also argued: "We would feel that the playing field were a little bit more even if we had questions about Mr. Rice's rehabilitation activities, not what happened 25 years ago."<sup>22</sup> In other words, Lake expected the Judge and Bureau to adopt counsel's bidding and essentially argue Lake's case. But the legal system functions differently and effectively because of its adversarial nature originating in the *Magna Carta*. Thus, it is not the Bureau's responsibility to assist Lake in its fact-finding process or any other duty to its client. Each party is responsible for investigating the facts and making its case. Rice's previous criminal convictions are necessary to determine Rice's qualifications to be a Commission licensee. As the Presiding Judge reminded Lake's counsel, Lake has the burden of proving rehabilitation.<sup>23</sup> Thus, Lake, and not the Bureau, was responsible for presenting preponderant evidence of Rice's rehabilitation in order to prove the issues in favor of Lake.<sup>24</sup>

*Arguendo*, even accepting Lake's charge, the Commission has expressly held that "the substance of an ALJ's interlocutory rulings are not a basis for disqualification because they are subject to review."<sup>25</sup> Clearly, the Commission rules governing appeals of interlocutory rulings "are designed to ensure orderly procedure in adjudicatory proceedings and to avoid the disruption which would take place if proceedings were interrupted every time a party was dissatisfied with the ALJ's ruling . . . ."<sup>26</sup>

## **B. Other Interlocutory Rulings**

Lake argues that the Judge incorrectly ruled that Lake's Motion in Limine to have Tammy Gremminger disqualified as an expert was premature.<sup>27</sup> Lake even suggests bias by rulings made in discovery matters, including one on June 11, 2015, two *years* before the hearing.<sup>28</sup> As noted above, interlocutory rulings are not a basis for disqualification because they are subject to review, and the rules governing appeals of interlocutory rulings are designed to ensure orderly procedure in adjudicatory proceedings.<sup>29</sup> Moreover, with regard to the Motion in Limine, the Judge had not yet ruled on the merits of the Motion in Limine when Lake filed the instant motion to disqualify the ALJ, but had simply ruled that it was too early because

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<sup>21</sup> Tr. 216:4-12 (May 3, 2017).

<sup>22</sup> Tr. 545:23-25 (May 4, 2017).

<sup>23</sup> Tr. 545:5-9 (May 4, 2017) ("JUDGE SIPPEL: I want to be clear about this. You have the burden of proof . . . . So you have the burden of proving rehabilitation.")

<sup>24</sup> Tr. 545:17-21 (May 4, 2017) ("JUDGE SIPPEL: What the Bureau does is none of your concern, unless they're bringing in false evidence, of course. But if . . . the Bureau is falling down on their part of that issue, that's not your problem. So I don't understand what this is all about. That's what I'm getting at.")

<sup>25</sup> *WWOR-TV, Inc.*, 4 FCC Rcd 6155, 6155 (1989).

<sup>26</sup> *Id.* at 6156.

<sup>27</sup> See Jacobs Declaration at 3.

<sup>28</sup> See *id.* at 2.

<sup>29</sup> *WWOR-TV, Inc.*, 4 FCC Rcd 6155, 6155-56 (1989).

Gremminger had not yet been *voir dired* on the witness stand.<sup>30</sup> As to the discovery rulings, as the Bureau correctly notes, to the extent that Lake felt it was aggrieved, it could have requested leave to file an application for review within five (5) days after the release of the Presiding Judge's orders.<sup>31</sup> However, the Bureau asserts, and Lake does not contest, that Lake never made such a request.<sup>32</sup>

### C. Presiding Judge's Conduct

Lake alleges that the Judge's conduct displayed a level of bias or prejudice which warrants disqualification.<sup>33</sup> First, Lake asserts that the Judge interrupted and questioned Mr. Rice during his cross-examination by the Bureau on Mr. Rice's written testimony.<sup>34</sup> Second, Lake believes that the Judge's persistence on the matter regarding evidence of children going to and from Mr. Rice's house during his parole reveals his bias against Mr. Rice, assuming that the Judge was "striving to make something out of what was factually and legally nothing."<sup>35</sup> Third, Lake argues that in its cross-examination of Dr. Weitzl, the Judge "became increasingly annoyed at Lake's counsel for pausing between questions," "[told] counsel to hurry up, questioned whether he was prepared, and showed general impatience," which was "very embarrassing to Lake's counsel . . . ."<sup>36</sup>

Nothing Lake alleges warrants the Presiding Judge's disqualification. The Supreme Court held that expressions of "impatience, dissatisfaction, annoyance, and even anger" do not establish bias or partiality and are "within the bounds of what imperfect men and women, even having been confirmed as federal judges, sometimes display."<sup>37</sup> Lake's argument is similar to the petitioner's in *Liteky*, which was rejected for failing to establish the requisite burden of proof. In *Liteky*, the petitioners argued that the judge "limit[ed] defense counsel's cross examination; question[ed] witnesses; periodically caution[ed] defense counsel to confine his questions to issues material to trial," and interrupted a defense closing argument.<sup>38</sup> The Court concluded that neither the rulings and statements made by the trial judge nor the judge's "admonishment" of petitioner's counsel and co-defendants justified disqualifying the judge.<sup>39</sup> Here, the Presiding

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<sup>30</sup> See Order, FCC 17M-22 (rel. April 27, 2017). The Judge did ultimately deny Lake's Motion in Limine, though he had not yet ruled at the time Lake filed its Motion to Disqualify the Presiding Judge. See Order, FCC 17M-29 (rel. Aug. 15, 2017).

<sup>31</sup> See 47 CFR §§ 1.301(b) & (c); Enforcement Bureau's Response to Lake's Motion to Disqualify the Presiding Judge (Bureau's Response) at 3.

<sup>32</sup> See Bureau's Response at 3.

<sup>33</sup> See Jacobs Declaration at 4.

<sup>34</sup> See *id.* at 2.

<sup>35</sup> *Id.* at 2-3.

<sup>36</sup> *Id.* at 3.

<sup>37</sup> *Liteky*, 510 U.S. at 555-56.

<sup>38</sup> *Id.* at 542-43. Cf. *Butz v. Economou*, 438 U.S. 478, 513 (1978) (federal administrative law judges are comparable to federal trial judges).

<sup>39</sup> *Id.* at 556.

Judge was only performing his duties to understand the issues, to avoid undue delay in the proceedings, and to protect witnesses from undue inconvenience.<sup>40</sup>

The same arguments for disqualification were presented and rejected again in *KAYE Broadcasters, Inc.* There, the petitioner argued that the presiding officer “badgered, harassed, and cut off testimony of its witnesses,” “refused to give reasons for sustaining objections to questions asked by KAYE’s counsel,” “precluded KAYE from making an offer of proof,” and “took over the examination of witnesses.”<sup>41</sup> Yet the petitioner’s motion to disqualify was denied because the trier of fact’s “reasonable and proper attempt” to conduct the hearing in an expeditious manner and his characterization of defense counsel’s conduct did not “reflect any improper prejudice or bias.”<sup>42</sup>

Lake has failed to meet its substantial burden of showing that the Presiding Judge has a personal bias or prejudice against Lake that would impair his ability to act in an impartial manner. The Judge’s questioning during *voir dire* was nothing more than an attempt to understand the issues raised during cross-examination, move the case forward, and accommodate witnesses on travel. It is only in the rarest of circumstances that a Presiding Judge’s statements or conduct during the proceedings will display the level of bias or prejudice necessary to warrant disqualification. Clearly, Lake has not made the requisite showing here to require disqualification.

#### **D. Judge’s Inquiry Regarding Future Applications**

Lake argues that the Judge made an improper request for a declaration by Rice that he would not file any applications in the future. Such declaration was to be submitted with Lake’s Motion to Dismiss. As the Judge had stated in his June 8, 2017 *Order*, he was concerned that Mr. Rice and/or Lake might file future broadcasting applications after the character issues were dismissed.<sup>43</sup> As pointedly explained in the *Order*, “to put off the trial of these character issues [until a future application] would run the risk of losing witnesses and/or their recollections, and other relevant evidence becoming stale.”<sup>44</sup>

### **CONCLUSION**

Lake must demonstrate that the Presiding Judge has some “deep-seated favoritism or antagonism that would make fair judgment impossible.”<sup>45</sup> Lake has failed to meet that burden.

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<sup>40</sup> Lake also asserts that the Judge “voice[d] off-the-record concerns about not being reversed as he was in *Titus*.” See Jacobs Declaration at 2. The Judge may have made a comment about *Titus* off the record. But disqualification is not warranted if the Presiding Judge’s statements merely displayed an accidental departure from “requisite judicial gravity.” See *KAYE Broadcasters, Inc.*, 35 FCC 2d 548, 554 (1972) (citing *United States v. Dennis*, 183 F.2d 201, 225-26 (1950)).

<sup>41</sup> *KAYE*, 35 FCC 2d at 550.

<sup>42</sup> *Id.* at 549.

<sup>43</sup> See *Order*, FCC 17M-25, at 2.

<sup>44</sup> See *id.* at 2-3.

<sup>45</sup> See *Family Broadcasting, Inc.*, 17 FCC Rcd at 19333 (quoting *Liteky*, 510 U.S. at 555 (internal quotations omitted)).

Moreover, Lake participated in the case for three years, yet it was not until the final day of the hearing, after lunch when the Bureau's witness had returned to the stand, that Lake's counsel announced that Mr. Rice had decided to "withdraw his application and withdraw from the proceeding, thereby ending the case."<sup>46</sup> Lake's hurried, unexpected, and untimely attempt to withdraw from the case at the finale of litigation gives an appearance of a litigant attempting to forum shop for a different judge. The D.C. Circuit expressly warned that "[t]he Commission is not required to play games with applicants."<sup>47</sup> To permit disqualification would allow Mr. Rice to do an end run around Commission procedure and force a time-wasting relitigation of the same issues before a new presiding judge, who would also be subject to challenge at any time convenient to a Rice applicant.

Finally, since Lake failed to meet its burden to establish a "bent of mind" against Lake and/or Mr. Rice by the Presiding Judge which might warrant his disqualification, Lake's Motion to Disqualify the Presiding Judge must be and **IS DENIED**.

**SO ORDERED.**

FEDERAL COMMUNICATIONS COMMISSION<sup>48</sup>

A handwritten signature in black ink, reading "Richard L. Sippel". The signature is fluid and cursive, with the first name "Richard" and last name "Sippel" clearly legible.

Richard L. Sippel  
Chief Administrative Law Judge

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<sup>46</sup> Tr. 653:4-11 (May 5, 2017).

<sup>47</sup> *Fischer v. FCC*, 417 F.2d 551, 555 (D.C. Cir. 1969).

<sup>48</sup> Courtesy copies of this Order will be sent on issuance by email to all counsel.